Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TELEPHONE AND DATA SYSTEMS, INC. File No. 10209-CL-P-715-B-88

For a construction permit to establish a new cellular system to operate on Frequency Block B in the Domestic Public Cellular Telecommunications Radio Service to serve the Wisconsin - 8 (Vernon) Rural Service Area-Market Number 715-B

ORDER ON RECONSIDERATION

Adopted: December 31, 1990; Released: January 15, 1991

By the Deputy Chief, Common Carrier Bureau:

1. Century Cellunet, Inc. ("Century"), Contel Cellular, Inc., Coon Valley Farmers Telephone Company, Inc., Hillsboro Telephone Company, LaValle Telephone Cooperative, Monroe County Telephone Company, Mount Horeb Telephone Company, North-West Cellular, Inc., Richland-Grant Telephone Cooperative, Inc., Vernon Telephone Cooperative and Viroqua Telephone Company ("Century Group")[1] filed a petition seeking reconsideration of a Memorandum Opinion and Order ("*Order*") released by the Mobile Services Division (MSD), which granted the application of Telephone and Data Systems, Inc. ("TDS") for authority to construct a wireline Block B cellular facility in the Vernon RSA.[2] For the reasons set forth below, we deny the petition for reconsideration and affirm the MSD *Order*.

I. BACKGROUND

2. On June 9, 1989, TDS was named tentative selectee for the wireline Block B construction authorization for the Vernon RSA. [3] Century, a mutually exclusive applicant, filed a petition to deny. In its petition, Century alleged that TDS held prohibited ownership interests in more than one application in the Vernon RSA. Century pointed out that ten of the thirteen wireline carriers ("wireline applicants") who filed applications for the Vernon RSA, including Century itself, and four additional wireline carriers with a presence in the Vernon RSA who did not file applications for the Vernon RSA ("carriers") entered into a post-filing, pre-lottery, partial settlement agreement.[4] The partial settlement agreement provided that if one of the applications of these ten wireline applicants won the lottery, a partnership made up of the signatories to the partial settlement agreement ("Wisconsin RSA 8 Partnership") would be substituted as the applicant for the Vernon RSA. While TDS was not a party to the partial settlement agreement, one of the four carriers that did not file an application for the Vernon market but was a party to the settlement agreement was UTELCO, Inc. (UTELCO), a company in which TDS owns 49% of the stock. Thus, Century argued, TDS had a prohibited ownership interest in more than one application for the same RSA. The MSD *Order* denied Century's petition. Subsequently, Century Group filed a petition for reconsideration of the *Order*, TDS submitted an opposition to the petition and Century Group filed a reply.

II. CONTENTIONS OF THE PARTIES

3. In its petition for reconsideration, Century Group reiterates the argument that Century made in its petition to deny, namely that TDS, because of its 49% ownership of UTELCO, had a prohibited ownership interest in more than one application for the Vernon RSA in violation of Section 22.921(b)(1) of the Commission's Rules, and that TDS failed to disclose the existence of the prohibited ownership interest as required by Section 1.65 of the Rules. Additionally, Century Group argues that, pursuant to Section 22.33(b)(2) of the Rules, TDS, through its ownership interest in UTELCO, was a member of a joint enterprise entitled to cumulative lottery chances in the Vernon RSA. Based on this joint enterprise theory, Century Group reiterates that TDS had an ownership interest in more than one application in the Vernon RSA and that TDS' application should be dismissed and a new lottery conducted.

4. In opposition, TDS contends that settlement agreements do not create any form of ownership interest which is cognizable under Section 22.921(b)(1) and thus, TDS, through UTELCO, acquired no interest in the application of Wisconsin RSA 8 Partnership, since the settlement agreement was never implemented. Additionally, TDS argues that since it was not subject to the settlement agreement, it was not obligated to report it to the Commission in its application. TDS notes that Section 22.33(b)(2) states explicitly that cumulative lottery chances will be awarded to partial settlement enterprises among wireline applicants. TDS avers that Section 22.33(b)(2) does not apply to TDS, because it was not a signatory to the partial settlement agreement and does not apply to UTELCO because it was not an applicant.

III. DISCUSSION

5. Century Group requests that we find TDS in violation of Section 22.921(b)(1) and dismiss TDS's application in the Vernon RSA because UTELCO joined a partial settlement group in the same market that TDS was already a wireline applicant. With regard to the viability of the partial settlement, the Commission has consistently stated that it favors settlement agreements among wireline applicants. *See* Section 22.29 of the Rules, and *Clarification of Requirements for Pre-filing Settlement Agreements by Wireline Applicants in Rural Service Area Cellular Markets*, 64 Rad. Reg. (P&F) 1637, 1638 (1988) (*Requirements*). Specifically, in the *Third Report and Order*, 4 FCC Rcd 2440 (1988), the Commission concluded that the prohibition against partial settlements for non-wireline applicants should not apply to wireline applicants. Similarly, Section 22.33(b)(2) of the Rules provides that a partial settlement among mutually exclusive cellular wireline applicants for RSAs, if entered into after the filing of individual applica-

tions by its members, will receive the cumulative number of lottery chances that the individual applicants would have had if no partial settlement had been reached.

6. Section 22.921(b)(1) states in pertinent part:

> No party to a wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, except that interests of less than one percent will not be considered.

TDS held a 49% interest in UTLECO, one of the parties to the partial settlement agreement. There is no doubt that, absent the fact that TDS had an application on file for the Vernon market, the partial settlement agreement was permissible under the Commission's Rules. *See Bloomington-Normal MSA Limited Partnership*, 3 FCC Rcd 3743 (Mob. Serv. Div. 1988).

7. Had TDS held a greater than 1% interest in any of the Century Group applicants at the time the applications were filed, all applications in which TDS had an interest would have been dismissed as violative of Section 22.921(b) because Section 22.921(b) prohibits wireline carriers from having greater than 1% ownership interests in more than one application in the same market. However, UTELCO was not an applicant in the Vernon RSA. Nonetheless, a violation of Section 22.921(b) occurred when UTELCO entered into the partial settlement agreement. Notwithstanding this violation, we decline to dismiss TDS's application because it would be inequitable to do so for three reasons. First, at the time it filed its application, TDS was in compliance with the Commission's Rules. After filing, Century Group formed a partial settlement group which included wireline carriers, such as UTELCO, who had not originally filed applications in the Vernon market. Century Group knew of TDS's ownership interest in UTELCO and, despite this knowledge, permitted UTELCO to join the settlement group. In these circumstances, it appears to be UTELCO's and Century Group's actions which led to the violation of Section 22.921(b) of the Rules and not TDS's actions.[5] Short of withdrawing its own application, TDS could do nothing more than object to UTELCO's entry into the partial settlement group.

8. Second, even if Century Group's theory were correct, a more appropriate sanction than dismissing only TDS's application would be to dismiss all Century Group applications and TDS's application since all of the these applications suffered from the rule violation.[6] This action would be inequitable to TDS because it was not within TDS's control to prohibit UTELCO from joining the settlement group.

9. Third, the cross-ownership rule is intended to prevent applicants from unfairly skewing the lottery by receiving cumulative chances to win a lottery. As such, the rule is intended to protect other applicants from being unfairly prejudiced in the lottery. Here, all the partial-settlment applicants had the power to veto UTELCO's participation in the settlement agreement. Whatever prejudice existed was wholly within their control and they failed to protect their own interests.[7] In these circumstances, we do not believe that dismissing TDS's application would be an appropriate sanction.

10. Similarly, we find that TDS has not violated Section 1.65 of the Rules. Petitioners' allegations regarding TDS' duty to disclose in its application the details of the partial settlement agreement are based on a misapplication of the obligations contained in *Requirements* 64 Rad. Reg. (P & F) at 1638. Section 1.65 obligates TDS, as an applicant, to maintain the continuing accuracy and completeness of its pending application. *Requirements* indicates that applicants should disclose the details of settlement agreements involving the applicant. TDS is not the controlling party in UTELCO which entered into the settlement agreement, and UTELCO was not an applicant in the Vernon RSA market. Particularly because the settlement agreement did not become effective when TDS won the lottery, TDS had no obligation to inform the Commission of the settlement.[8]

11. After carefully reviewing the facts and circumstances in the record before us, we affirm the grant of the application of Telephone and Data Systems, Inc.[9]

IV. CONCLUSION AND ORDERING PARAGRAPH

12. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by Century Cellunet, Inc., *et. al.* IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughn
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] The Century Group consists of wireline carriers who are losing applicants in the Wisconsin-8 (Vernon) Rural Service Area Market Number 715-B (Vernon RSA) wireline lottery or who are non-applicant wireline carriers with a presence in the Vernon RSA.

[2] *Memorandum Opinion and Order*, 4 FCC Rcd 8021 (Mob. Serv. Div. 1989).

[3] Public Notice, Report No. CL-89-174 (June 9, 1989).

[4] Twelve wireline applicants entered the lottery for Market No. 715 Wisconsin - Vernon. Of these twelve applicants, TDS, GTE Mobilnet Incorporated (GTE) and Ameritech Mobile Communications, Inc. (Ameritech) did not enter into the partial settlement agreement. GTE and Ameritech did not file petitions against TDS.

[5] Century Group alleges that TDS somehow tricked it by withdrawing from the settlement at the last moment. TDS denies this allegation. Century Group could have written the settlement agreement to exclude UTELCO if TDS did not sign, but it failed to do so. TDS was under no legal obligation to protect Century Group's interest in the settlement.

[6] Under the circumstances, other equitable sanctions for violation of Section 22.921(b) would be to punish the settling applicants for permitting UTLECO to join the settlement or to punish UTELCO directly for entering into the partial settlement agreement.

[7] GTE and Ameritech were the only applicants other than TDS which could have been prejudiced by any technical violation of Section 22.921(b), and neither GTE nor Ameritech challenged TDS's application.

[8] Notwithstanding, the Commission did become aware of the partial settlement agreement, including UTELCO's involvement, through letters submitted prior to the lottery.

[9] To the extent that the MSD *Order* suggests that any contingent interest in a cellular application does not amount to an ownership interest within the meaning of Section 22.921(b)(1), the *Order* is overruled.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of	)	
	)	
TELEPHONE AND DATA SYSTEMS, INC.	)	No. 10209-CL-P-715-B-88
	)	
For Authority to Construct and Operate a Domestic Cellular Radio Telecommunications System on Frequency Block B to serve the Wisconsin 8 - Vernon Rural Service Area; Market No. 715	)	

To: The Commission, en banc

APPLICATION FOR REVIEW

KENNETH E. HARDMAN, P.C.
2033 M Street, N.W.
Suite 400
Washington, D.C. 20036

Attorney for:

CENTURY CELLUNET, INC.
CONTEL CELLULAR, INC.
COON VALLEY FARMERS TELEPHONE COMPANY, INC.
FARMERS TELEPHONE COMPANY
HILLSBORO TELEPHONE COMPANY
LAVALLE TELEPHONE COOPERATIVE
MONROE COUNTY TELEPHONE COMPANY
MOUNT HOREB TELEPHONE COMPANY
NORTH-WEST CELLULAR, INC.
RICHLAND-GRANT TELEPHONE COOPERATIVE, INC.
VERNON TELEPHONE COOPERATIVE
VIROQUA TELEPHONE COMPANY

February 15, 1991

SUMMARY OF APPLICATION FOR REVIEW

The Order On Reconsideration unlawfully failed to dismiss TDS' application as defective, in light of the fact that the Order correctly found that a violation of Section 22.921(b)(1) of the rules occurred when TDS refused at the last minute to join the Settlement Group, and instead maintained a separate and independent application for Wisconsin 8, while its subsidiary UTELCO, INC. simulutaneously joined the Settlement Group.

The reasons given for refusing to enforce the rule simply do not survive scrutiny. The fact that the violation ripened after the applications were filed, rather than before, is wholly irrelevant. Moreover, there is no basis in the record whatsoever for the Order's assertions that TDS had no power over UTELCO's actions, and such assertions are flatly contradicted by the normal inferences arising out of the fact that UTELCO is a subsidiary of TDS. Additionally, the Order's assertion that somehow the other members of the Settlement Group were equally in violation of Section 22.921(b)(1), and were equally culpable with TDS, is a palpable misapplication of the rule and a flagrant distortion of the facts in this case.

Even if the Commission clings to the staff's improper refusal to dismiss TDS' application and to relottery the market among the remaining applicants, the least the Commission should do is to void the lottery and the settlement group, and to relottery the market among all applicants.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of	)	
	)	
TELEPHONE AND DATA SYSTEMS, INC.	)	No. 10209-CL-P-715-B-88
	)	
For Authority to Construct and Operate a Domestic Cellular Radio Telecommunications System on Frequency Block B to serve the Wisconsin 8 - Vernon Rural Service Area; Market No. 715	)	

To: The Commission, en banc

APPLICATION FOR REVIEW

Century Cellunet, Inc. (Century), Contel Cellular, Inc. (Contel), Coon Valley Farmers Telephone Company, Inc. (CVF), Farmers Telephone Company (FTC), Hillsboro Telephone Company (HTC), LaValle Telephone Cooperative (LTC), Monroe County Telephone Company (MCTC), Mount Horeb Telephone Company (MHTC), North-West Cellular, Inc. (NWC), Richland-Grant Telephone Cooperative, Inc. (RGTC), Vernon Telephone Cooperative (Vernon) and Viroqua Telephone Company (Viroqua) (hereinafter sometimes referred to collectively as the "Settling Partners"), by their attorney, respectfully make application to the Federal Communications Commission, en banc, to review and reverse, as hereinafter more fully set forth, the Order On Reconsideration (the "Recon. Order") issued by the Deputy Chief, Common Carrier Bureau, DA 90-1917, adopted December 31, 1990 and released January 15,

1991.* In the Recon. Order the Deputy Bureau Chief found, as he must, that Section 22.921(b)(1) of the Commission's rules was violated when Telephone and Data Systems, Inc. (TDS) maintained a separate application for the Wisconsin 8 wireline cellular authorization, while its subsidiary UTELCO, Inc. (UTELCO) joined the settlement group which was attempting to achieve a full market settlement in Wisconsin 8. Nonetheless, the Deputy Bureau Chief refused to dismiss TDS' application as defective, as normally required by the rules and Commission precedent, and he refused to find a violation of Section 1.65 of the rules. Accordingly, the Settling Partners seek reversal of the Recon. Order to the extent the Deputy Bureau Chief refused to dismiss TDS' application or otherwise to impose an appropriate sanction for violation of Sections 22.921(b)(1) and 1.65 of the rules. In support thereof, the Settling Partners respectfully show:

Introduction

In the lottery conducted by the Commission on March 15, 1989, the captioned application of TDS was selected for the wireline cellular frequency block in the Wisconsin 8-Vernon Rural Service Area (the "Wisconsin 8 RSA"). See Public Notice Report No. CL-89-107, dated March 16, 1989; Public Notice Report No. CL-89-174, dated June 9, 1989.

---

* The Recon. Order erroneously does not list Farmers Telephone Company as one of the parties seeking reconsideration. Compare Recon. Order at Para. 1 with Petition for Reconsideration at p. 1.

Each of the Settling Partners is a local exchange carrier (LEC) with a presence in the Wisconsin 8 RSA or a commonly-owned affiliate of such a LEC; and each of the Settling Partners, with the exception of HTC and LTC, filed an application to serve the Wisconsin 8 RSA which was mutually exclusive with the application filed by TDS. In addition, each of the Settling Partners entered into a pre-lottery settlement agreement (the "Wisconsin RSA 8 Settlement Agreement" or "Settlement Agreement"), as expressly permitted by the Commission's rules, whereby a general partnership comprised of the Settling Partners and certain other LECs* would be substituted as the wireline cellular licensee in the event an application filed by any of parties to the Settlement Agreement was selected in the lottery.

TDS actively participated with the Settling Partners throughout the negotiations leading up to the execution of the Settlement Agreement, and had affirmatively led the Settling Partners to believe that TDS would in fact enter into the Settlement Agreement along with the other parties in the ordinary course. However, after leading the Settling Partners to believe that it intended to execute the Settlement Agreement up until the time the lottery was held, TDS refused at the eleventh hour to do so for reasons that still remain a mystery.

---

* The Settlement Agreement included four LECs with an exchange presence in the Wisconsin 8 RSA who did not file applications there.

One of the four non-applicant LECs admitted to the Settlement Agreement was UTELCO, Inc. (f/k/a United Telequipment Corporation). UTELCO is 49% owned by TDS, with no other stockholder having as much as 10%; and TDS also holds an option to purchase the remaining 51% of UTELCO. When the Settling Partners voted to admit UTELCO into the Settlement Agreement, it was their understanding that both UTELCO and TDS would be executing the Settlement Agreement and joining the partnership. However, only UTELCO did so--TDS abruptly refused at the last minute to do so.

Nonetheless, the Chief of the Mobile Services Division initially granted TDS' application.* The Chief concluded that Section 22.921(b)(1) of rules was not violated at all because "TDS did not have any interest in the applications filed by the other wireline applicants". MO&O at Para. 7. The Chief further opined that adopting the position of the Settling Partners in the petition to deny "would be inconsistent with the Commission's policy of favoring full or partial settlements among wireline RSA applicants," (id.) and that since "TDS was not a party to the settlement agreement, and UTELCO was not an applicant," there was no violation of Section 1.65 of the rules. (Id. at Para. 8).

In the Recon. Order for which review is herein sought, the Deputy Bureau Chief found that Section 22.921(b)(1) of the rules was indeed violated when TDS maintained its

---

* Telephone and Data Systems, Inc., 4 FCC Rcd 8021 (MSD 1989) (hereinafter the "MO&O").

separate application while its subsidiary simultaneously joined the Settlement Group, and he reversed the contrary conclusion in the MO&O. Recon. Order at Paras. 7, 11 & n. 9. However, the Deputy Bureau Chief still refused to dismiss TDS' application as defective because, in his view, "it would be inequitable to do so". Recon. Order at Para. 7. Moreover, the Deputy Bureau Chief refused to find that TDS violated Section 1.65 of the rules by failing to update its application to disclose that its subsidiary had entered into a settlement agreement, contending that "TDS is not the controlling party in UTELCO ... and UTELCO was not an applicant in the Vernon RSA market." Recon. Order at Para. 10.

The issues presented for review are (1) whether the Recon. Order lawfully refused to dismiss TDS' application as defective, or to impose other appropriate sanctions, notwithstanding that Section 22.921(b)(1) was violated when TDS maintained its separate application while its subsidiary joined the Settlement Group; (2) whether the Recon. Order correctly found that the applications filed by the Settling Partners also were in violation of Section 22.921(b)(1) of the rules by reason of the fact that TDS' subsidiary joined the Settlement Group; (3) whether the Recon. Order correctly found that "UTELCO's and Century Group's actions ... led to the violation of Section 22.921(b) of the Rules and not TDS's actions;" and (4) whether the Recon. Order correctly found that "TDS is not the controlling party in UTELCO" and, hence, did not violate Section 1.65 of the rules by failing

to disclose the settlement activities of its subsidiary UTELCO. See 47 C.F.R. Sec. 1.115(b)(1) (1989).

Review is warranted because the Deputy Bureau Chief's action conflicts with established precedent that violation of Section 22.921(b)(1) renders an application defective within the meaning of Section 22.20 of the rules, and because the Deputy Chief's failure to dismiss TDS' application is predicated on erroneous findings of important and material questions of fact. See 47 C.F.R. Sec. 1.115(b)(2) (1989).

Argument in Support of Review

The Settling Partners are gratified that the Deputy Bureau Chief at least found that Section 22.921(b)(1) of the rules was violated when TDS maintained its separate application notwithstanding that its subsidiary joined the Settlement Group. However, his belief that it would be "inequitable" to dismiss TDS' application as a consequence of such violation is predicated on findings which are entirely unsupported in the record, and which simply cannot survive scrutiny in light of the facts in this case.

Accordingly, the Recon. Order herein cannot stand. On review, the Commission is respectfully requested to dismiss TDS' application as defective, as its rules and precedents otherwise require. At a minimum, if the Commission clings to the (erroneous) belief that the Settling Partners are no less culpable than TDS, then the least the Commission must do is to void the lottery result and the partial settlement,

and to relottery the market among all applicants.

Perhaps the core errors permeating the discussion in the Recon. Order are the wholly unsupported assumptions that "it was not within TDS' control to prohibit UTELCO from joining the settlement group" (Recon. Order at Para. 8), that "TDS could do nothing more than object to UTELCO's entry into the partial settlement group" (Id. at Para. 7), and that "TDS is not the controlling party in UTELCO" (Id. at Para. 10). These findings form the essential basis of the Recon. Order's (erroneous) belief that it would be inequitable to penalize TDS for its subsidiary's actions in joining the settlement group, and for its (false) conclusion that TDS did not violate Section 1.65 of the rules by failing to disclose the settlement activities of its subsidiary UTELCO.

Contrary to the Recon. Order, the record discloses that TDS owns 49% of UTELCO's stock; that TDS holds an option to acquire the remaining 51%; and that the ownership of the remaining 51% is now spread among a number of individuals, each one of whom holds less than 10%. See, e.g., Petition to Dismiss or Deny, dated July 27, 1989, p. 4 & n. *, Appendix B at Exhibit VIII. UTELCO also constitutes a "subsidiary" of TDS under Section 22.13(a)(1)(i) of the rules; and pursuant to that rule TDS listed UTELCO (then known as United Telequipment Corporation) as a "Subsidiar[y] of Applicant With Interests in Paging and Other Radio Facilities" in its application herein. Exhibit No. 1,

Attachment C, p. 6.

Moreover, TDS has never made any claim in this proceeding, much less established such claim in its papers, similar to these findings in the Recon. Order. In fact, what it did say in this regard is that "since UTELCO did not file an application, its relationship to TDS is not properly before the FCC." Opposition to Petition for Reconsideration, dated December 29, 1989, p. 9 & n. 3. (Emphasis added). Thus, in making these findings, the Recon. Order simply embarked on a fantasy with no basis whatsoever in the record.*

Moreover, the normal inference from the fact that one entity holds 49% of the stock of a company, with the balance spread among a number of individuals with less than 10% each, is that the entity with 49% wields effective control. In short, absent any undisputed countervailing evidence in the record, and there is none, the foregoing Recon. Order's findings are contrary to and totally undermined by UTELCO's

---

* The ventilation of this basic error obviates the need for extended discussion of the Recon. Order's failure to find that TDS violated Section 1.65 of the rules. See Recon. Order at Para. 10. Once the implications of UTELCO's status as a subsidiary of TDS are properly accounted for in this case, the Commission obviously must pierce the corporate veils of TDS and UTELCO for purposes of requiring compliance with the rules. See, e.g., Amendment of Part 62, 101 F.C.C.2d 495, 505 (FCC 1985) ("Parent ... companies could be expected to exert significant control over their carrier subsidiaries. Against this background, we believe it is necessary to impute the status of their subsidiary carriers and, thus, to apply the requirements ... to parent ... companies in order to discharge our responsibilities under the Act. To do otherwise would allow the statutory purposes ... to be circumvented through the use of separate corporate entities.") The Commission also is respectfully referred to pp. 18-20 of the Petition for Reconsideration for a fuller discussion of this issue.

status for regulatory purposes as a subsidiary of TDS.*

Similarly unsupported, as well as absolutely erroneous, are the findings that the Settlement Group's applications themselves "suffered from the rule violation" (Recon. Order at Para. 8), and that "UTELCO's and Century Group's actions ... led to the violation ... and not TDS' actions" (Recon. Order at Para. 7). The findings are wholly unelaborated and stands all logic and reason on their head. The Settlement Group was trying to reach a full market settlement, precisely what the Commission's policies favored. TDS participated fully in the negotiations and caused the Settlement Group to believe that TDS would sign the settlement agreement along with its subsidiary UTELCO and the other members of the group, but TDS refused to do so at the eleventh hour under circumstances that make out a prima facie case of bad faith.**

---

* In any event, if the Commission wishes to go beyond the normal inferences associated with the fact that UTELCO is a subsidiary of TDS, then there must be, but has not yet been, an appropriate evidentiary investigation on which to base findings of fact. If the Commission chooses to pursue this issue, it should be aware, e.g., of the existence of a memorandum dated July 10, 1989, from Dave Thurow, Chairman of the Settlement Group, to then FCC counsel for the group, a copy of which is annexed hereto. The Commission should further be aware, e.g., that the Settling Partners will offer to prove that at one or more settlement meetings prior to the lottery, a Mr. Dave Healy attended on behalf of TDS and represented to the group that he also spoke for UTELCO at the meeting.

** As the Commission undoubtedly is aware, the settlement process in any given market frequently culminates for all participants at the eleventh hour before the lottery for that market, when the participants sign off on final changes to the settlement agreement (albeit from dispersed geographic locations), and sign the agreement itself. That

Moreover, after TDS refused to sign the settlement agreement, TDS was in fact the only applicant in Wisconsin 8, contrary to the Recon. Order, that continued to maintain its own separate, independent application at the same time it maintained an interest in the Settlement Group through its subsidiary UTELCO. Contrary to the Recon. Order, the applicants in the Settlement Group maintained only their interest in the Settlement Group -- a group that complied in all respects with the Commission's rules; they had no interest whatsoever in TDS' application. Again, only TDS, not the applicants in the Settlement Group, maintained separate and independent interests in more than one application or application set.

It is further pertinent in this regard, as the Recon. Order otherwise acknowledges, that the underlying purpose of Section 22.921(b)(1) was to "prevent applicants from unfairly skewing the lottery". See Recon. Order at Para. 9. Having UTELCO join the Settlement Group, while TDS refused to do so, skewed the lottery only in favor of TDS, and not in favor of the Settling Partners. That is, out of a total of 13 applications in the RSA, TDS had a one-in-thirteen chance for a 100% interest in a grant as a result of its independent application, and, by having UTELCO join the Settlement Group, TDS also obtained a ten-in-thirteen chance

---

is what occurred in this case, as illustrated by the initialled pages of the settlement agreement, and the counterpart signature pages, annexed as Attachment A, Exhibit 1, to the Petition to Deny herein.

for a 7.1% interest in a grant.

By contrast, the Settling Partners never had any sort of interest in TDS' application, and permitting UTELCO to join the Settlement Group had the effect of diluting each member's interest from a 7.7% interest in a possible grant to a 7.1% interest, without increasing in any way the members' chances of winning the lottery. Under these circumstances, the Recon. Order's conclusion that the applications filed by members of the Settlement Group somehow also violated Section 22.921(b)(1) when UTELCO joined the Settlement Group is entirely baseless, arbitrary and untenable.*

Accordingly, the Recon. Order's purported justification for refusing to dismiss TDS' application disintegrates altogether. The fact that TDS violated Section 22.921(b)(1)

---

* With the benefit of 20-20 hindsight, the Recon. Order states that the Settlement Group should have written the proposed settlement agreement to exclude UTELCO if TDS did not sign. With the benefit of the same 20-20 hindsight, the Settling Partners readily agree. However, insofar as the Settling Partners were concerned, there was never any issue of whether or not TDS would be signing; and with the press of other matters that had to be dealt with at the last minute to put the settlement together and attempt to achieve a full market settlement, insisting on such a provision, had it occurred to the Settling Partners to do so, would have been perceived as excessively paranoid. After all, the Settling Partners thought that everyone in the group was dealing in good faith with each other. The Recon. Order's willingness to condone such sharp and apparently unethical negotiating practices is especially unfortunate and insupportable, in light of the taint on the Commission's wireline settlement and licensing process that necessarily results from TDS' conduct.

after it filed its application, rather than before,* is a distinction without a difference. Since the purpose of the rule, as noted above, is to prevent an applicant from skewing the lottery, it would appear that the lottery is the seminal event for purposes of the rule's enforcement, and not the initial filing of the application.

In any case, it is certainly not unusual that a Public Mobile Service application which is proper when filed becomes defective and subject to dismissal by reason of events which occur after filing.** That is the reason for having Section 1.65 of the rules, which requires keeping the information in an application current, and is part of the reason that the staff's myopic analysis of TDS' Section 1.65 obligations in this case is so untenable.*** Moreover, the

---

* The Recon. Order at Para. 7 cites as its first reason for declining to dismiss TDS' application that "at the time it filed its application, TDS was in compliance with the Commission's Rules."

** See, e.g., Message Center, Inc., 5 FCC Rcd 7622 (MSD 1990) (traffic load study valid at time application was filed became invalid, thereby rendering application defective, when applicant failed to update study after constructing granted facility and initiating service; applicant's failure also constituted violation of Section 1.65 of the rules); Tel-E-Page, Inc., 52 R.R.2d (P&F) 1428 (CCB 1983) (grant of license to operate other facilities in same market rendered pending application one for additional facilities requiring traffic loading study, and applicant's failure to supply study within 30 days required dismissal of application as defective).

*** Had TDS timely updated its application when its subsidiary acquired a separate interest in the Settlement Group, as Section 1.65, properly construed, requires it to do, there is at least the hope that the processing staff would have recognized at the time that this fact rendered TDS' application defective, and that it would have dismissed rather than granted TDS' application. Since the processing

Recon. Order's premise that somehow the Settling Partners were the culpable parties, and not TDS, or were at least equally culpable with TDS, is an outrageous fabrication and distortion of the record, as shown above.*

Under all of these circumstances, there is no lawful basis whatsoever to refuse to follow the otherwise unbroken chain of precedent that violation of Section 22.921(b)(1) of the rules requires dismissal of TDS' application. MV Cellular, Inc., 103 F.C.C.2d 414 (FCC 1986); Portland Cellular Partnership, 2 FCC Rcd 5586 (MSD 1987), aff'd 4 FCC Rcd 2050 (FCC 1989), rev'd on other grounds 897 F.2d 1164 (D.C.Cir. 1990); Henry County Telephone Company, et al., Mimeo No. 2747, File No. 34178-CL-P-098-B-84 (CCB 1986); Florida Cellular Mobile Communication Corporation, DA 91-34, 5 FCC Rcd ____ (MSD 1991); Progressive Cellular III B-3, DA 91-68, 5 FCC Rcd ____ (MSD 1991). Indeed, the staff otherwise relies on what it characterizes as "the Commission's strict

---

staff did not have this information to review in the context of processing TDS' application prior to grant, it obviously failed at the time to comprehend the implications of these events.

* In fact the Recon. Order findings are not even internally consistent. It cannot possibly both be true that "it was not within TDS' control to prohibit UTELCO from joining the settlement group," (Recon. Order at Para. 8) and that "all the partial settlement applicants had the power to veto UTELCO's participation in the settlement agreement." (Recon. Order at Para. 9). All of the applicants stood on the same footing in the settlement discussions, including TDS, which participated fully. Thus, if it were true that the applicant members of the Settlement Group could "veto UTELCO's participation," then it could not be true that "it was not within TDS's control to prohibit UTELCO from joining the settlement group".

policy to comply with Section 22.921". Florida Cellular, supra, at Para. 5, to justify return of cellular applications as defective; and no different result is warranted in this case. At the very least, but without prejudice to the Settling Partners' position that TDS' application must be dismissed, the Commission should void the lottery and settlement agreement and simply relottery the market among the existing applicants.

Conclusion

The Recon. Order should be reversed; TDS' application should be rejected as defective for violation of Sections 22.921(b)(1) and 1.65 of the rules; and the Wisconsin 8 RSA should be submitted for another lottery among the then remaining applicants. Alternatively, the Commission should void the lottery and the settlement agreement altogether because of TDS' rule violations, and should relottery the market among all existing applicants.

Respectfully submitted,

CENTURY CELLUNET, INC.
CONTEL CELLULAR, INC.
COON VALLEY FARMERS TELEPHONE COMPANY, INC.
FARMERS TELEPHONE COMPANY
HILLSBORO TELEPHONE COMPANY
LAVALLE TELEPHONE COOPERATIVE
MONROE COUNTY TELEPHONE COMPANY
MOUNT HOREB TELEPHONE COMPANY
NORTH-WEST CELLULAR, INC.
RICHLAND-GRANT TELEPHONE COOPERATIVE, INC.
VERNON TELEPHONE COOPERATIVE
VIROQUA TELEPHONE COMPANY

By Kenneth E. Hardman
Kenneth E. Hardman

Their Attorney

KENNETH E. HARDMAN, P.C.
2033 M Street, N.W.
Suite 400
Washington, D.C. 20036
Telephone: 223-3772

February 15, 1991

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Application for Review upon Telephone and Data Systems, Inc. by mailing a true copy thereof, first class postage prepaid, to its attorney, Peter M. Connolly, Esquire, Koteen & Naftalin, 1150 Connecticut Avenue, N.W., Washington, D.C. 20036.

Dated at Washington, D.C., this 15th day of February, 1991.

Kenneth E. Hardman
Kenneth E. Hardman

MEMO
NORTH-WEST CELLULAR, INC.

To: Robert Jackson

From: Dave Thurow

Date: 7/10/89

Subject: Wisconsin RSA #8 Petition

I am enclosing photocopies of the following:

Pre-Lottery Settlement Agreement
Signature pages of 14 participants
Various correspondence and minutes of meetings

Of the possible participants, TDS/US Cellular, Ameritech Mobile Communications and GTE Mobilnet did not sign the Settlement Agreement.

I have attempted to include anything that may have some bearing on the situation, although I am not exactly sure which areas are most critical. The February 8, 1989 meeting was the time at which UTELCO first was present, and Mr. Charles Metcalf indicated that he had been communicating with TDS in regard to the pre-lottery settlement agreement. He stated that TDS had authorized him to vote on TDS's behalf at that meeting, and that TDS would abide by whatever way he voted.

Please let me know if you have any questions in this regard.

Dave Thurow

copy: Fred Englade, Jim Smart